83-423

Office-Supreme Court, U.S.
FILED
AUG 30 1983
ALEXANDER L. STEVAS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO._____

J.E. FILLMORE,
ALSO KNOWN AS,
JESSIE E. FILLMORE,

PETITIONER,

VS.

THE STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

EVERETTE A. PRICE, JR.
ATTORNEY FOR PETITIONER
P.O. BOX 1014
BREWTON, ALABAMA 36427
205-867-6222

QUESTIONS PRESENTED FOR REVIEW

I.

When a Defendant appeals his trial conviction as a matter of right to an Intermediate Appellate Court, in this case, the Court of Criminal Appeals of Alabama, is that Defendant denied equal protection under the law when the intermediate Appellate Court affirms his conviction without any written opinion.

II.

When a Defendant appeals his trial conviction as a matter of right to an Intermediate Appellate Court, in this case, the Court of Criminal Appeals of Alabama, is that person denied his right to due process and/or his right to adequate Appellate representation by counsel when the Intermediate Appellate Court affirms his conviction without any written opinion.

III.

When a Defendant appeals his conviction as a matter of right to an Intermediate Appellate Court (Court of Criminal Appeals of Alabama) and subsequent appeals to the State Supreme Court are limited to the facts stated in the opinion of the Intermediate Appellate Court (in this case no opinion and/or facts) does a denial by the Intermediate Appellate Court of a Motion to Supplement the Facts (for purposes of appeal) effectively deny the De-

fendant his right to due process, equal protection and/or effective Appellate representation under the Sixth and Fourteenth Amendments to the Constitution of the United States.

PARTIES TO THE PROCEEDING IN COURT BELOW

The Petitioner, J.E. Fillmore, also known as Jessie E. Fillmore, and the Respondent, The State of Alabama, were the only parties.

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OPINION BELOW

The rulings of the Court of Criminal Appeals as to the original appeal filed on August 31, 1982, was affirmed without opinion, (428 Ala. 1375), set forth in Appendix 1A.

The denial for the Petitioner's application for rehearing, as well as Motion for Rule 39(k), on May 3, 1983, as set forth infra in Appendix 2A-8A. The denial of the Petitioner's petition for Writ of Certiorari by the Supreme Court of Alabama is dated July 1, 1983.

JURISDICTION

The petition invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 1257 (3) in that it sets up a claim of the petitioner's rights under the right to have the assistance of counsel as provided in the Sixth and Fourteenth Amendments to the Constitution of the United States; hence petitioner's application to this Honorable Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States in pertinent part states as follows:

> "...and to have assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner, J.E. Fillmore, (hereinafter Fillmore), was indicted of violating §13A-8-17, Code of Alabama 1975, of receiving stolen property in the first degree by the Fall Term of 1980 Grand Jury of Escambia County, Alabama. Defendant was arraigned and pled not guilty on October 10, 1980. The case came on to be tried on November 14, 1980 and resulted in a mistrial (R. 350). The case was again placed on the Jury Trial Docket for January 29, 1981, continued until the Spring Term of 1981 and ultimately tried on September 2, 1981 and September 3, 1981, before the Honorable Douglas S. Webb, presiding Circuit Judge, with a jury which returned a verdict of guilty. A Motion for New Trial was filed on October 2, 1981, and continued. The State filed a Motion for Injunction and Protective Order to prohibit the Defendant from calling its jurors as witnesses on the Motion. Petitioner was sentenced on October 6, 1981. That Motion was granted on December 1, 1983 (R. 371). The Petitioner filed a Motion of January 6, 1982, for exception to the Protective Order supported by affidavit requesting one witness and was denied on January 13, 1982. (R. 378-380).

The Motion for New Trial was denied by Court on March 9, 1982 (R. 384).

Written Notice of Appeal was given on April 19, 1982. Two extensions of time were granted for completion of Court Reporter's transcript - June 10, 1982, and July 6, 1982. Appeal to the Court of Criminal Appeals of Alabama was affirmed on March 29, 1983, without opinion (Appendix 1A). Application for new hearing was filed on April 11, 1983. Rule 39(k) and Motion and Application for Rehearing were denied on May 3, 1983. With no opinion (Appendix 2A-8A) Writ of Certiorari was filed with the Supreme Court of Alabama on May 16, 1983, and denied without opinion on July 1, 1983 (Appendix 27A).

STATEMENT OF THE FACTS

The only testimony in the trial of this case which places anything other than constructive possession of the stolen property in the Appellant is the testimony of the State's witness, Mr. Nalty. Mr. Nalty testified that he met the Appellant and another party (Mr. Mitchell) coming into the property around 3:00 P.M. on July 2, 1980, and then subsequently identified him as "directing the combine off the trailer", (R. 102-103), however, this biased witness admitted that he and the Appellant had an on-going disagreement and lawsuit against each other, (R. 93), and that he could not have gotten closer than one (1) mile to the stolen property in thickly wooded area of thirty-five (35) foot trees, (R. 111), at a height of not less than one thousand (1,000) feet, (R. 113-114). The witness had previously testified that he could not see the face of the man directing the combine because of a pine tree, (R. 113), but this time he positively identified the Appellant "by association", (R. 113), and he admitted, "Do you reckon you remember this because you saw Mr. Fillmore later on that day?", and he answered, "Yes, sir", (R. 115). This, then is the extent of the testimony on possession of the stolen property, the combine; other than it being first on the property of the witness, Mr. Nalty, and later on Mr. Fillmore.

There was no other evidence of how it was moved and no evidence or even if the truck and trailer being on Appellant's property, or under his control.

The Appellant also would extend the record to show that not only was improper evidence submitted at the trial of the case, but was also argued to this Honorable Court on appeal. The Attorney General's office refers in its brief to testimony of "another piece of stolen farm equipment within plain view of Appellant's residence, and that suspicious pesticides were confiscated from Appellant's barn", R. 279-282), Appellee's brief page twelve. At the same time, the State knew and had proven that this Appellant's residence was some thirty-eight to forty-five (38-45) miles from the location of the combine and truck and trailer, (R. 247-248). This evidence and reference to it further indicates the conspiracy to convict alleged in Appellant's Issue IV on this appeal and should be considered by the Court.

ARGUMENT

Fillmore, in accordance with State Appellate procedure, confronted the Alabama Court of Criminal Appeals with its failure to provide the petitioner with a fair and impartial trial by jury, a copy of which is incorporated herein by reference and attached. (Appendix 2A-8A .) Thereafter, Fillmore raised by petition on Writ of Certiorari filed in the Alabama Supreme Court of Appeals denying the petitioner his right to due process of a right to appeal and is a violation of Defendant's Sixth Amendment, the right to effective assistance of counsel. A copy is attached (Appendix 22A-26A).

Fillmore requests review by this Honorable Court upon the properly raised constitutional issue which was omitted from consideration by the Alabama Court of Criminal Appeals both on submission of the case and upon rehearing, and by the Alabama Supreme Court.

I.

Petitioner Fillmore is not indigent. While it has taken some time for the Courts to develop the Sixth Amendment right with respect to an indigent person, the law is clear at this time that all persons are entitled to the effective assistance of counsel in felony prosecutions unless that right is clearly and intelligently waived. Carnely vs. Cochran, 369 U.S. 506 (1962). It is also well

settled that Defendants in criminal prosecutions are entitled to the effective assistance of counsel on appeal. Douglas vs. California, 372 U.S. 353, 9 L Ed. 811, 83 S. Ct. 814 Reh. Den. 373 U.S. 905, 10 L Ed. 2d 200, 83 S. Ct. 1288.

In addition to the Sixth Amendment argument concerning the effective assistance of counsel, this Court, in Griffin vs. Illinois, 351 U.S. 12, 100 L Ed. 891, 76 S. Ct. 585 (1956), and Douglas vs. California, 372 U.S. 353, 9 L Ed. 811, 83 S. Ct. 814 Reh. Den. 373 U.S. 905, 10 L Ed. 2d 200, 83 S. Ct. 1288, has been concerned with the requirement that equal protection be afforded certain Defendants who could not afford trasncripts necessary where State Appellate Review was a matter of right. While it is clear in this appeal that Petitioner Fillmore was able to purchase a transcript for the purposes of an appeal, as a matter of right, he nevertheless, was denied his right to equal protection and the effective assistance of Appellate counsel when the Intermediate Appellate Court confirmed his conviction without any opinion. A clear analogy can be made between the denial to an indigent person of a transcript for the purpose of appeal and the denial by the Intermediate Appellate Court to render an opinion. An indigent Defendant cannot successfully appeal to the Appellate Courts without a transcript. No criminal Defendant can successfully appeal (and/or file Motions for Rehearings)

a decision by the Intermediate Appellate Court that is without opinion. If an indigent person is entitled to a transcript under Griffin vs. Illinois, 351 U.S. 12, 100 L Ed. 891, 76 S. Ct. 585 (1956), it makes sense that all persons (indigent or otherwise) are entitled to have the Appellate Court state specifically the reasons for the affirmance of the judgment below.

Equal treatment in the Appellate process is as fundamental a right as equal treatment in the Trial process. When the Intermediate Court of Criminal Appeals in the State of Alabama affirms a conviction without opinion it, in effect, forecloses to the Appellant any subsequent effective assistance of counsel. In later appeals and/or post-conviction procedures, counsel for the convicted person is without a factual statement from the Court of Criminal Appeals and a specific opinion. What then are the issues to be raised in later appeals and/or post-conviction remedies? How can an attorney effectively frame and/or shape the issues for later appeals if the reasons for the affirmance of the conviction are not given by the Intermediate Appellate Court?

II.

The failure to give a written opinion by the Intermediate Court is in fact a denial of due process to the petitioner. It is inherently unfair

in that the petitioner is effectively denied any subsequent review where there is no reason given for affirming. The Court foreclosed any further effective assistance of counsel as guaranteed by the Constitution in that there is nothing in the Appellate Court's range of review. This failure to present facts for review both on the original appeal, the denial of the Application for Rehearing, as well as any other post conviction remedies he might have otherwise had access to utilize. This appellate process in Alabama was not discretionary, but a matter of right and is in line with the Douglas infra, as well as applying equally to hired counsel being effective as indigent counsel. The Fifth Circuit concluded in West vs. Louisiana, 478 F 2d 1026 5 Cir. (1973) that, "...to administer justice without respect to persons and to equal right to the poor and to the rich, we must apply the same standard whether counsel be Court-appointed or privately retained". No attorney can be adequate or effective in his representation in the appellate level if the intermediate appellate level can simply conclude the appellate process by refusing or failing to opine the reasons for affirmance.

III.

The petitioner applying the proper appellate

procedure filed a Motion 39(k) under Alabama Rules of Appellate Practice (Appendix 2A-8A), which supplements the facts in the opinion as can be substituted in lieu of the facts in the opinion. The Court of Criminal Appeals denied the 39(k) Motion on May 3, 1983, and therefore effectively prevented the last effort of the petitioner to place facts for review in the State Supreme Court of Alabama. This ruling again denies the petitioner due process and equal protection of the law under the Constitution of the United States.

Fillmore submits that the Court of Criminal Appeals' failure to write a written opinion both on the original submission and application for rehearing and Motion for Rule 39(k) application, denies the Defendant of his Federal due process and right to effective counsel assistance under the Sixth and Fourteenth Amendments to the Constitution of the United States.

The issues presented herein embrace the fundamental teachings of the Sixth and Fourteenth Amendments as fostered by this Honorable Court. Said review by certiorari is proper for this Court and upon a final decision on the merits, Fillmore prays this Honorable Court to reverse and render his conviction below.

Respectfully submitted,

Everette A. Price, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO._____

J.E. FILLMORE,
ALSO KNOWN AS,
JESSIE E. FILLMORE,

PETITIONER,

VS.

THE STATE OF ALABAMA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

APPENDIX

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

Re: CC 80-337

3rd Div. 559 Escambia Circuit Court

J.E. FILLMORE, ALIAS
Appellant

vs

THE STATE
Appellee

Dear Sir: This is to advise you that on March 29, 1983 the Court of Criminal Appeals announced decision of:

affirmance

No opinion.

In the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK

THIRD DIVISION NUMBER 559

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

J.E. FILLMORE,
ALSO KNOWN AS,
JESSIE E. FILLMORE,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

APPEALED FROM THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA
(CASE NO. CC-80-337)

APPLICATION FOR REHEARING

Comes now the Appellant, J.E. Fillmore, also known as Jessie E. Fillmore, by and through his counsel of record, Everette A. Price, Jr., and respectfully moves this Court for a rehearing, praying that the Judgment heretofore entered by this Court on March 29, 1983, affirming the conviction of Appellant be set aside and held for naught. We submit herewith brief and argument in support of this application.

As no opinion was rendered in this Court's decision, Appellant respectfully requests, pursuant to Rule 39(k) Alabama Rules of Appellate Procedure, that this Court's opinion be extended to include the following facts from the record:

The only testimony in the trial of this case which places anything other than constructive possession of the stolen property in the Appellant, is the testimony of the State's witness, Mr. Nalty. Mr. Nalty testified that he met the Appellant and another party (Mr. Mitchell), coming into the property around 3:00 P.M. on July 2, 1980, and then subsequently identified him as "directing the combine off the trailer", (R. 102-103), however, this biased witness admitted that he and the Appellant had an on-going disagreement and lawsuit against each other, (R. 93), and that he could not have gotten closer than one (1) mile to the stolen property in thickly wooded area of thirty-five (35) foot trees, (R.111), at a height of not less than one thousand (1,000) feet, (R. 113-114). The witness had previously testified that he could not see the face of the man directing the combine because of a pine tree, (R. 113), but this time he positively identified the Appellant "by association", (R. 113), and he admitted, "Do you reckon you remember this because you saw Mr. Fillmore

later on that day?", and he answered, "Yes, sir", (R. 115). This, then, is the extent of the testimony on possession of the stolen property, the combine; other than it being first on the property of witness, Mr. Nalty, and later on Mr. Fillmore. There was no other evidence of how it was moved and no evidence or even if the truck and trailer being on Appellant's property, or under his control.

The Appellant also would extend the record to show that not only was improper evidence submitted at the trial of the case, but was also argued to this Honorable Court on appeal. The Attorney General's office refers in its brief to testimony of "another piece of stolen farm equipment within plain view of Appellant's residence, and that suspicious pesticides were confiscated from Appellant's barn", (R. 279-282), Appellee's brief page 12. At the same time, the State knew and had proven that this Appellant's residence was some thirty-eight to forty-five (38-45) miles from the location of the combine and truck and trailer, (R. 247-248). This evidence and reference to it further indicates the conspiracy to convict alleged in Appellant's Issue IV on this appeal and should be considered by the Court.

Respectfully submitted,

Everette A. Price, Jr.

APPELLANT REQUESTS ORAL ARGUMENT.

For grounds for same, Appellant shows that in order for the Court to fully understand the atmosphere which permeated the trial of this case, it is necessary to be able to argue and be questioned concerning the same and to argue to emphasize the importance of this case being reconsidered.

Everette A. Price, Jr.
Attorney for Appellant

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

Re: CC 80-337

3rd Div. 559 Escambia Circuit Court

J.E. FILLMORE ALIAS
Appellant

vs.

THE STATE
Appellee

Dear Sir: This is to advise you that on May 3, 1983 the Court of Criminal Appeals announced decision of:

application for rehearing overruled

Rule 39(k) motion denied

No opinion

in the above stated cause.

Yours truly,
MOLLIE JORDAN, CLERK

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing Application for Rehearing on the Attorney General of the State of Alabama, attorney for Appellee, by placing said copy in the U.S. Mail first class postage, prepaid, and addressed as follows:

Hon. Charles A. Graddick
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

This 11th day of April, 1983.

Everette A. Price, Jr.
Attorney for Appellant

Address of Counsel:

Everette A. Price, Jr., P.A.
109 Blacksher Street
P.O. Box 1014
Brewton, Al. 36427

THE STATE OF ALABAMA ---JUDICIAL DEPARTMENT

THE COURT OF CRIMINAL APPEALS OF ALABAMA

October Term 1982-83

To the Clerk of the Circuit Court of Escambia County- Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said county, in a certain cause lately pending in said Court between

J.E. FILLMORE, ALIAS,
APPELLANT,

and

THE STATE,
APPELLEE,

wherein by said Court, it was considered adversely to said appellant, were brought before our Court of Criminal Appeals, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS hereby certified, That it was thereupon considered by our Court of Criminal Appeals, on the 29th day of March, 1983, that said judgment of said Circuit Court be in all things affirmed, and that it was further considered that the appellant pay the cost accruing on said appeal in this Court and in the Court below

Witness, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, at the Capitol,

this the 1stday of July, 1983.

May 3, 1983. Rule 39(k) motion denied; APPLICATION FOR REHEARING OVERRULED.

July 1, 1983. PETITION FOR CERTIORARI DENIED BY THE SUPREME COURT OF ALABAMA.

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Case No. CC - 80 - 337

THIRD DIVISION NUMBER 559

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

J.E. FILLMORE
JESSIE E. FILLMORE,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA

BRIEF AND ARGUMENT IN SUPPORT OF
APPLICATION FOR REHEARING

OF

EVERETTE A. PRICE, JR.
ATTORNEY FOR APPELLANT
109 BLACKSHER STREET
P.O. BOX 1014
BREWTON, ALABAMA 36427

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ISSUE I FOR REVIEW

I. Whether Trial Court committed reversible error in failing to grant a Motion for Directed Verdict for the Defendant-Appellant, for the State's failure to prove a prima facie case of receiving stolen property for lack of proof of possession?

Luscious vs. State, 38 Ala. App. 484, 87 So. 2d 659 (1956);
Kidd vs. State, 24 So. 2d 771, 32 Ala. App. 262 (1946);
Haynes vs. State, 45 Ala. App. 32, 222 So. 2d 183 (1969);
Lawson vs. State, 38 Ala. App. 322 82 So. 2d 812;
McConnell vs. State, 48 Ala. App. 523, 266 So. 2d 328 (1972).

STATEMENT OF THE FACTS

Appellant adds the following facts per Appellant's request for additional facts pursuant to Rule 39(k) Alabama Rules of Appellate Procedure, as requested in Appellant's Application for Rehearing:

The only testimony in the trial of this case which places anything other than constructive possession of the stolen property in the Appellant, is the testimony of the State's witness, Mr. Nalty. Mr. Nalty testified that he met the Appellant and another party, (Mr. Mitchell), coming into the property around 3:00 P.M. on July 2, 1980, and then

subsequently identified him as "directing the combine off the trailer", (R. 102-103), however, this biased witness admitted that he and the Appellant had an on-going disagreement and lawsuit against each other, (R. 93), and that he could not have gotten closer than one (1) mile to the stolen property in thickly wooded area of thirty-five foot (35') trees, (R. 111), at a height of not less than one thousand (1,000) feet, (R. 113-114). The witness had previously testified that he could not see the face of the man directing the combine because of a pine tree, (R. 113), but this time he positively identified the Appellant "by association", (R. 113), and he admitted, "Do you reckon you remember this because you saw Mr. Fillmore later on that day?", and he answered, "Yes, sir", (R. 115). This, then, is the extent of the testimony on possession of the stolen property, the combine; other than it being first on the property of witness Mr. Nalty, and later on Mr. Fillmore. There was no other evidence of how it was moved and no evidence or even if the truck and trailer being on Appellant's property, or under his control.

The Appellant also would extend the record to show that not only was improper evidence submitted at

the trial of the case, but was also argued to this Honorable Court on appeal. The Attorney General's office refers in its brief to testimony of "another piece of stolen farm equipment within plain view of Appellant's residence, and that suspicious pesticides were confiscated from Appellant's barn", (R. 279-282), Appellee's brief page 12. At the same time, the State knew and had proven that this Appellant's residence was some thirty-eight to forty-five (38-45) miles from the location of the combine and truck and trailer, (R. 247-248). This evidence and reference to it further indicates the conspiracy to convict alleged in Appellant's Issue IV on this appeal and should be considered by the Court.

ARGUMENT

The Trial Court committed reversible error when it failed to grant a directed verdict for the State's failure to prove a prima facie case namely, proof of possession of stolen property.

The indictment instigating the case listed three (3) pieces of stolen equipment. A tractor-trailer rig and a combine; we are only concerned with the combine because the tractor-trailer never left the land of witness, Mr. Nalty, and was never on the property of Appellant, Mr. Fillmore. This Court has said that in order for there to be a conviction for receiving stolen property, the defendant must be shown to have control over the property. This case should be reheard and reversed because the indictment alleged three (3) particularly described pieces of personal property only one of which was even constructively placed around the Defendant-Appellant. The only testimony even vaguely related to possession which this Court has defined as "not limited to actual manual control upon or about the person, but if under one's power and dominion the thing is possessed"; Lawson vs. State, 38 Ala. App., 82 So. 2d 812; McConnell vs. State, 48 Ala. App. 523, 266 So. 2d 328 (1972).

This is the testimony of the State's witness, Mr. Nalty. Mr. Nalty's testimony was obviously

confused and in conflict with prior testimony. He and Appellant had been involved in a lawsuit for several years, (R. 93) and set out in Application for Rehearing under Rule 39(k) Alabama Rule of Appellate Procedure). And they had repeated disagreement. This is the place the State would try to prove Appellant took possession of stolen equipment; next door to the Appellant's worst enemy? Mr. Nalty testified in companion cases discussed in the appeal brief and referred to in the Application for Rehearing, and this brief later; as well as having testified in an earlier mistrial of this present case. He testified that he could not see the Appellant's face because of a pine tree, (R. 113), and that he, Nalty, had flown over the land one (1) mile from the truck at a height of one thousand (1,000) feet in a thickly wooded area of thirty-five foot (35') pine trees, (R.111), and earlier had admitted he identified Appellant Fillmore, "by association", (R.113), and because he saw him later on that day, (R.115). This testimony is obviously cleared up in the present trial solely by Mr. Nalty to convict his enemy, Appellant Fillmore. This Court has repeatedly held that Judgment of Guilt in criminal cases cannot rest upon speculation, surmise or suspicion, Luscious

vs. State, 87 So. 2d 659, 38 Ala. App. 484 (1956), but if this case is allowed to start and not be reheard and reversed how else could this Court describe Mr. Nalty's testimony except as being speculation (association), surmise, from one (1) mile away in a piney wood thicket, and suspicion, because of their previous disagreements and law-suits.

This case should be reheard.

ISSUE II FOR REVIEW

II. Whether the atmosphere and attitudes and references to another case being tried simutaneously across the hall and other evidence not related, worked towards giving the Appellant a fair and impartial trial?

U.S. Constitution
Amendment Six

1901 Alabama Constitution
Art. 1 § 7

ARGUMENT

The Appellant also raises in its Application for Rehearing, under Rule 39(k) Alabama Rules of Appellate Procedure, (Supra), that this Court should rehear because of the overriding conspiratorial effort to influence the jury to convict in this case. And respectfully extended the facts to show that at the trial and argument to this Court on appeal, the State referred to testimony of "another piece of stolen farm equipment within plain view of Appellant's residence and that suspicious pesticides were confiscated from Appellant's barn", (R. 279-282). This evidence, coupled with the knowledge that the Appellant resided many miles from where the property involved in this case was located, was introduced and allowed only to further prejudice this Jury to convict, (R. 247-248), which was raised in the Appellant's Motion for New Trial and presented in its Application for Rehearing. This case should be reheard and reversed for both of the issues raised since the combination of them shows that this Appellant was denied a fair and impartial Jury and was convicted by and large through highly prejudiced evidence as well as evidence from a witness of questionable veracity.

CONCLUSION

Appellant respectfully requests the Court to rehear this case and to decide that the testimony of Mr. Nalty was insufficient to provide proof beyond a reasonable doubt and to a moral certainty of possession of stolen property and to reverse the decision for failure of the Trial Court to protect the Appellant's right to a fair and impartial trial.

Respectfully submitted,

EVERETTE A. PRICE, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Application for Rehearing on the Attorney General of the State of Alabama, attorney for Appellee, by placing said copy in the U.S. Mail, first class postage, prepaid, and addressed as follows:

Hon. Charles A. Graddick
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

This 11th day of April, 1983.

EVERETTE A. PRICE, JR.
ATTORNEY FOR APPELLANT

ADDRESS OF COUNSEL:

Everette A. Price, Jr., P.A.
109 Blacksher Street
P.O. Box 1014
Brewton, Al. 36427

IN THE SUPREME COURT OF ALABAMA

J.E. FILLMORE,
ALSO KNOWN AS,
JESSIE E. FILLMORE

(APPELLANT) PETITIONER

VS.

STATE OF ALABAMA

(APPELLEE) RESPONDENT

APPEALED FROM THE COURT OF CRIMINAL APPEALS ALABAMA

PETITION FOR WRIT OF CERTIORARI

OF

J.E. FILLMORE,
ALSO KNOWN AS
JESSIE E. FILLMORE

EVERETTE A. PRICE, JR., P.A.
ATTORNEY FOR PETITIONER

ADDRESS OF COUNSEL:

EVERETTE A. PRICE, JR.,P.A.
109 BLACKSHER STREET
P.O. BOX 1014
BREWTON, ALABAMA 36427

PETITION FOR WRIT OF CERTIORARI

TO: THE SUPREME COURT OF ALABAMA:

Comes your Petitioner, J.E. Fillmore (Jessie Fillmore), and petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above styled cause under Rule 39(k) of Alabama Rules of Appellate Procedure, and as grounds for said Writ of Certiorari shows unto this Court as follows:

1. Status of this case: Defendant-Petitioner was tried and convicted on September 3, 1981, of receiving stolen property. The Court of Criminal Appeals affirmed the conviction on March 29, 1983. An Application for Rehearing was filed with the Court of Criminal Appeals on April 11, 1983, and overruled on May 3, 1983, with no opinion.

2. There was no opinion rendered by the Court of Criminal Appeals either on the original Appeal or on the Application for Rehearing.

3. The basis of this petition for Writ of Certiorari to the Court of Criminal Appeals is that the decision of this case is in conflict with the decision of the Court of Criminal Appeals in the case of: Luscious vs. State, 38 Ala. App. 484, 87

So. 2d 659 (1956); and Haynes vs. State, 45 Ala. App. 31, 222 So. 2d 183 (1969).

4. This case at bar conflicts with the decisions in this Honorable Court in Scott vs. State, Ala. 374 So. 2d 316 (1979).

5. Additional basis for this Writ of Certiorari is that Defendant has been denied his right of due process under the Constitution of the United States and the Constitution of the State of Alabama which constitutions allow appeal from the Trial Court's decision. By virtue of the fact that the Court of Criminal Appeals failed repeatedly to render a written opinion and denied the Defendant's Motion for Rehearing under Rule 39(k), this intermediate Court denied his right of due process to appeal, (see copy of Application for Rehearing under Rule 39(k) attached hereto and made a part hereof by record as if set out in full, and marked as Exhibit "A").

6. The Petitioner further shows unto this Honorable Court that the failure of the Court of Criminal Appeals to render a written opinion or grant the Rule 39(k) Motion is a violation of the Petitioner's right under the Sixth (VI) Amendment to the Constitution of the United States, allowing for effective assistance of counsel on appeal, in

that counsel cannot possibly be effective on appeal to this Court without any knowledge of the rationale of the Court of Criminal Appeals.

Petitioner respectfully requests that after preliminary examination of this petition and supporting brief, that a Writ of Certiorari to the Court of Criminal Appeals be granted; that this Court proceed under its rules to review the matters complained of; that the judgment of the Court of Criminal Appeals be reversed on grounds the Trial Court erred to reversal in overruling Defendant's Motion for Directed Verdict and Motion for New Trial on the grounds that the State failed to prove possession in this cause.

Respectfully submitted,
EVERETTE A. PRICE, JR., P.A.

EVERETTE A. PRICE, JR.
P.O. BOX 1014
BREWTON, AL. 36427

CERTIFICATE OF SERVICE

I certify that I have this ___ day of May, 1983, served a copy of the foregoing Petition for Writ of Certiorari and Supporting Brief on Charles Graddick, Attorney General, State of Alabama, 250 Administration Building, 64 North Union Street, Montgomery, Alabama, 36130, by placing a copy of same in the U.S. Mail, first class postage prepaid, and properly addressed.

EVERETTE A. PRICE, JR.
ATTORNEY FOR PETITIONER

CERTIFICATE OF FILING

I certify that I have this ____day of May, 1983, filed a copy of the foregoing Petition for Writ of Certiorari and supporting Brief with the Clerk of the Court of Criminal Appeals of Alabama, by mailing same by certified mail to the office of said Clerk.

EVERETTE A. PRICE, JR.
ATTORNEY FOR PETITIONER

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

JULY 1, 1983

Re: 82-753

Ex Parte: J.E. Fillmore
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: J.E. Fillmore, alias vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXXPetition for Writ of Certiorari denied. No opinion. ADAMS, J.--TORBERT, C.J., FAULKNER, ALMON AND EMBRY, JJ., CONCUR.

DOROTHY F. NORWOOD
Acting Clerk, Supreme
Court of Alabama

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO._____

J.E. FILLMORE
ALSO KNOWN AS
JESSIE E. FILLMORE,
PETITIONER,

VS.

THE STATE OF ALABAMA,
RESPONDENT.

On petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Alabama.

ENTRY OF APPEARANCE OF COUNSEL

Comes now Everette A. Price, Jr., Attorney for the petitioner in the above styled cause, and respectfully requests that his appearance therein be entered pending the docketing of this appeal. In connection therewith, the said attorney represents as follows:

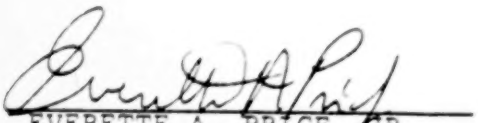
1. He is a member in good standing of the Bar of the Supreme Court of the United States.

EVERETTE A. PRICE, JR.
Counsel for Petitioner
P.O. Box 1014
Brewton, Alabama 36427
Phone: 205-867-6222

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been served on each party to this cause by depositing the same in the United States Mails, postage prepaid, and addressed as follows:

Hon. Charles A. Graddick
Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130



EVERETTE A. PRICE, JR.